STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
The Honorable Perry M. Buckner, III, Circuit Court Judge
Appellate Case No. 2019-001842

THE STATE,.....RESPONDENT

v.

ALFRED T. WALKER #307914,.....APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-0265

J. STROM THURMOND
Solicitor Second Judicial Circuit
P.O. Drawer 3368
Aiken, South Carolina 29802
(803) 642-1557

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of authorities.....ii

Appellant's question presented.....iv

Respondent's counter statement of question presented.....iv

Statement of the case.....1

Standard of review.....3

Statement of facts.....4

Argument

1. The Circuit Court Judge did not abuse its discretion by not relying on any discrepancies in the transcript testimony against the transportation sheets, because no discrepancy existed.....7

2. The Circuit Court did not abuse its discretion because the transportation sheets did not reveal the Appellant was asked questions after he expressed he did not wish to talk.....9

3. The Court did not abuse discretion because it did not allow a new trial due to the Appellant stating he was intoxicated at the time the crime occurred.....11

4. The Court did not abuse discretion because the solicitor did not have the Appellant's juvenile mental health records, so there exists no violation of Rule 5.....13

5. The lower court did not abuse discretion by not ruling to amend the Appellant's sentence. The Appellant was eighteen when he committed the crime so he was given a lawful sentence of life without parole.....14

Conclusion.....16

TABLE OF AUTHORITIES

CASES

Aiken v. Byers, 410 S.C. 534, 765 S.E.2d 572 (2014).....15

Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).....2

Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).....10

Jackson v. Wyrick, 730 F.3d 1177 (8th Cir. 1984).....11

Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed2d 213 (1975).....10

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012).....14

Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999).....11

State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006).....12

State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (2011).....4

State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).....4

State v. Johnson, 413 S.C. 458, 776 S.E.2d 367 (2015).....12

State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998).....8

State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005).....12

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).....4

State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981).....14

State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).....8

State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).....12

State v. Walker, Op. No 2008-UP-021 (S.C. Ct. of App. filed 1/10/08).....1

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (1991).....3

United States v. Finch, 557 F.2d 1234 (8th Cir. 1977).....11

RULES

Rule 5(C)(D) SCRCrimP.....13
Rule 29(b)SCRCrimP.....4

STATUTE

S.C. Code Ann. §16-3-20(2010).....15

APPELLANT'S QUESTION PRESENTED

1. Did the circuit court abuse its discretion by relying on defendant's discrepancies in the transcript of testimony at trial and transportation sheets from Barnwell county jail, were not after-discovered evidence?

2. Did the circuit court judge abuse its discretion where law enforcement continued to question the defendant in violation of his right to remain silent after he repeatedly informed officers he did not wish to talk?

3. Did the circuit judge abuse its discretion, where at the time Appellant spoke to law enforcement, he was intoxicated, under the influence of drugs, and diagnosed with antisocial personality disorder, was not after discovered evidence?

4. Did the circuit court judge abuse its discretion, where the State failed to produce defendant's October 20, 2000 "waiver of Miranda rights form and mental health records as a juvenile," was not after discovered evidence?

5. The lower court erred where the judge by passed a "Categorical Exemption Test" by not ruling on Appellant's motion "in the alternative to amend the sentence" where Walker was a mere eighteen year old at the time of the offense, was abuse of discretion?

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the circuit court judge abuse discretion by relying on defendant's discrepancies in the transcript of testimony at trial and the transportation sheets, because no discrepancy existed between what was introduced by the Appellant and the testimony given during the *State v. Denno* hearing?

2. Did the circuit court judge abuse its discretion where law enforcement continued to question the defendant where he informed the officer that he did not wish to talk, and later informed Investigator Martin that he wish for him to come to the jail to speak with him?

3. Did the circuit court judge abuse discretion where the Appellant testified that at the time he was questioned he was intoxicated and under the influence of drugs; however, no officer noticed this at the time of the interrogation?

4. Did the circuit court abuse discretion in deciding against the Appellant's motion when during the trial the solicitor provided the court with the advice or rights forms during each interrogation, or not presenting the Appellant's mental health records where the solicitor was not obligated to provide to the defense?

5. Did the lower court err when they decided not to rule on the Appellant's motion in the alternative to amend the sentence due to the fact he was eighteen when he committed the offense where the *Aiken v. Byers* decision did not apply because the Appellant was not a minor when he committed the offense?

STATEMENT OF THE CASE

On October 18, 2000, the Appellant along with his co-defendant were arrested and charged with the offenses of two counts of murder, assault and battery with intent to kill, criminal conspiracy, armed robbery, and possession of a weapon during the commission of a violence offense. Each defendant was later indicted by the Barnwell County Grand Jury for each of these offenses. On March 26, 2001, the Appellant was given notice by the solicitor that they intended to seek the death penalty.

On March 5, 2005, the trial began against the Appellant. During pre-trial, a *Jackson v. Denno* hearing was conducted regarding prior statements made by the Appellant. At the conclusion, the trial judge decided to grant the Appellant's motion of the Appellant to exclude some statements made by the Appellant to Investigator Rodney Pruitt. These were the statements made by the Appellant right after he was detained and stated that he didn't wish to speak anymore. The judge did decide to allow all of the remaining statements into evidence.

After the third day of trial the Appellant decided to plea. He pled under *North Carolina v. Alford* for the two counts of murder and guilty for all of the remaining offenses. The trial judge sentence the Appellant to consecutive life sentences for both offenses of murder, and the maximum concurrent for all of the other offenses. After this conviction the Appellant filed a timely notice of appeal before this court. This court later decided to deny this appeal *State v. Walker,* Op. No. 2008-UP-021 (S.C. Ct. of App. filed 1/10/08)

While his appeal was still pending, the Appellant filed a petition for post-conviction relief (PCR) alleging ineffective assistance of counsel. The PCR hearing was held on February 3, 2009. before the Honorable Doyet A. Early, III. Upon the conclusion of this hearing the PCR court decided to deny the Appellant's petition for PCR. On June 1, 2010, the Appellant filed a

subsequent PCR pursuant *Austin v. State.*[1] The court later entered a consent order dismissing this application. The Appellant filed a notice of appeal before the South Carolina Supreme Court on October 7, 2011. This appeal was later denied by the Supreme Court on November 2, 2011.

On January 25, 2012 the Appellant filed a third PCR application which was still pending when he filed a petition for writ of habeas corpus. The third PCR application was denied on July 2, 2013, the habeas petition denied on August 26, 2013.

On June 3, 2019, counsel for the Appellant W. Benjamin McClain filed a motion for new trial based on after discovered evidence. (R. pp. 18-20) A hearing was held on September 29, 2019 before the Honorable Perry M. Buckner. Present was the Appellant along with his counsel W. Benjamin McClain, representing the state of South Carolina, Assistant Solicitor David Miller of the Second Circuit Solicitors office. During this hearing certain matters were stipulated by both parties. Both parties agreed that the hearing could be held in Jasper County; even though the Appellant was sentenced in Barnwell County. Both parties also stipulated that the missing pages of the transcript were not needed in order to proceed with this motion.

During this hearing the Appellant argued that there were some transportation sheets that were never recovered proving a discrepancy between these sheets and the testimony of the investigators during his *Jackson v. Denno* hearing. He also argued that his mental health records were never provided by the solicitor through discovery, and he also made a motion to amend his sentence due to his youth at the time he committed the offense.

---

[1] Where convict alleged in his second post-conviction (PCR) application that he expressed desire to seek review of denial of his PCR application but that his counsel failed to timely seek review, convict stated claim of ineffective assistance, thus requiring remand for evidentiary hearing on issue of whether in fact convict requested and was denied opportunity to seek appellate review. *Austin v. State,* 305 S.C. 453, 409 S.E.2d 395 (1991).

At the conclusion of the hearing the court decided to deny the Appellant's motion for new trial. The court made their decision based on the fact that with any due diligence, the transportation sheets would have been found prior to trial; and, even if these sheets were discovered it would not have changed the outcome of the trial. (R. pp. 250 – 263)

The Appellant now proceeds before this court pursuant to a per se notice of appeal. Pursuant to this appeal the Appellant alleges that the trial court abused its discretion by not relying on the discrepancies between the trial testimony and the transportation sheets introduced during the hearing. The Appellant further argues that the trial judge abused his discretion by not ruling that the officers continued to question him after he informed them he did not wish to talk; that the court did not consider he was under the influence of drugs; and, that the State failed to produce his October 20 waiver of Miranda. The Appellant finally argued that the trial court erred in not considering his motion to amend the sentence due to the fact he was only eighteen at the time he committed this offense.

The Respondent argues that the trial court was correct in the denial of his motion for new trial. The Appellant failed to present any evidence revealing that these transportation sheets would have changed the outcome of the trial or that they were not able to be found prior to trial. The Respondent will also argue that since the Appellant was not a minor at the time he committed this crime he was not entitled to consideration pursuant to the South Carolina Supreme Court decision of *Aiken v. Byers.* The Respondent's brief supporting these arguments follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of

discretion. *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on error of law, or when grounded in factual conclusions without evidentiary support. *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. Rule 29(b) SCRCriP. A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge. *State v. Harris,* 391 S.C. 539, 545, 706 S.E.2d 526, 529 (2011)

STATEMENT OF FACTS

On October 18, 2000, at the Sonic drive-in restaurant in Barnwell, South Carolina, the Appellant along with his Co-Defendant went inside armed with weapons with the intent to commit robbery. While inside, the Appellant shot one of the victims in the leg. The Defendants took the other workers to the back of the restaurant. The Appellant's gun jammed as he was attempting to shoot one of the victims in the face. The co-defendant shot one victim in the face and demanded the other victim to open the safe. The defendants got twenty dollars and then brought the victim to the front. As the victim was begging for his life he was shot in the head by the co-defendant. (R. p. 185 lines 14-22) After this occurred both defendants fled the scene.

Members of the Barnwell County Sheriff's Department reported to the scene. The deputies were informed by a truck driver that two black males fled the scene and ran across the street to a local Walmart. (R. p. 102 lines 13-21) As they were beginning to block off the road to the Sonic a car pulled out. The deputies activated their blue lights and stopped the vehicle. There were four individuals inside the vehicle, once they were pulled over, the driver got out and fled. (R. p. 106 line 24 – p. 107 line 11) The other occupants in the vehicle were ordered to get out of the vehicle.

(R. p. 108 lines 2-24) It was later learned by the officers that two of these individuals were the Appellant and his co-defendant.

During the investigation, chief investigator Rodney Pruitt observed the Appellant and his co-defendant handcuffed sitting on the curb near a police car. (R. p. 132 lines 4-6) They expressed to Investigator Pruitt that they wanted to talk. (R. p. 133 lines 20-25) Investigator Pruitt then sought permission to speak with the defendants from Investigator Tom Gantt who was the lead case investigator. (R. p. 135 lines 1-8) Once permission was granted, he brought the Appellant to the back seat of his vehicle, his *Miranda* warnings were read and he received a statement from the Appellant. Prior to questioning Investigator Pruitt searched the Appellant and found a .25 caliber bullet in his pants pocket. (R. p. 137 lines 12-15) During the questioning the Appellant informed Investigator Pruitt that he did not wish to talk anymore, but he never requested an attorney. (R. p. 139 lines 1-6)

Later that night, Wayne Martin, an investigator with the Second Circuit Solicitor's Office, was called to the scene. After questioning the co-defendant was informed that the Appellant was in the process of being transported to the county jail. Prior to being transported, Investigator Martin asked the Appellant if he had something to say. The Appellant responded "I'll be at the jail come and see me." (R. p. 166 lines 19-23) Investigator Martin went to the county jail where he met the Appellant and asked him if he wanted to go to the solicitor's office to make a statement. The Appellant informed him that he wished to do that, so Investigator Martin transported the Appellant to the solicitor's office in the early morning hours of October 19, 2000.(R. p. 167 lines 14-21)

At the solicitor's office the Appellant was present with Investigator Martin and reserve officer Wayne Smiley. At the request of the Appellant officer Smiley was ask to leave the room. Prior to questioning, Investigator Martin informed the Appellant of his *Miranda* rights and he

signed a form waiving those rights. During questioning, the Appellant informed Investigator Martin that he was at the scene but he did not have a gun and that he did not shoot anyone, he expressed that all of the victims were shot by his co-defendant. (R. p. 176 lines 21-23)

At the end of questioning Investigator Martin went back to the scene, where he was informed by the South Carolina Law Enforcement (SLED) crime scene technician Diane Bodie, that two different caliber shell casings were found at the scene. (R. p. 176 lines 5-9) Upon hearing this information, Investigator Martin returned to the county jail to question the Appellant. He transported him back to the solicitor's office and asked the Appellant if he wished to give another statement in light of the new evidence revealed to him. (R. p. 182 lines 20-25) Once again Investigator Martin informed the Appellant of his *Miranda* rights and got him to sign another form waiving those rights. After this, the Appellant was willing to give him another statement regarding this event. At this time, he admitted that he had a gun and he threw the gun on the backside of Litchfield Apartments. He drew Investigator Martin a diagram of where he threw this gun. (R. p. 184 lines 12-19) Upon receiving this information Investigator Martin contacted the SLED agent to inform her that he has possibly received the location of the weapon. She expressed to him that it would be better if the Appellant was brought to the scene so he could assist them in finding this weapon. (R. p. 184 line 21 – p. 185 line 5) The Appellant was brought to the scene, where he pointed to an area where he threw the gun. He then expressed to Investigator Martin that he had a gun, and he shot one victim by accident, and the co-defendant took the other two victims into the back room where he shot them both in the head. (R. p. 185 lines 14-22) He was taken back to the county jail as the other officers searched the scene for the gun, the gun was never found. (R. p. 185 lines 14-22)

Investigator Martin later returned to the jail and was informed by jail personnel that the Appellant wanted to speak with him. (R. p. 188 lines 23-24) Once again the Appellant was given and waived his *Miranda* warnings. The Appellant told Investigator Martin that he wanted to write a letter of apology to the victim he shot in the leg, and he wanted Investigator Martin to deliver this letter. Investigator Martin expressed to him that he might not accept it, but that he would deliver the letter anyway. (R. p. 191 lines 5-13)

At the end of the day Investigator Martin was contacted once again by county jail personnel informing him that the Appellant wished to speak with him. (R. p. 193 lines 2-4) Investigator Martin went back to the county jail to speak with the Appellant. He again informed the Appellant of his *Miranda* rights which were waived by the Appellant. The Appellant wanted to tell him the truth about where he hid the gun. He told Investigator Martin that he hid the gun in a shed behind Walmart. He was then taken out to this scene where he pointed out to investigators were the gun was located. The gun was found in the exact location where the Appellant informed them it would be. (R. p. 193 lines 6-21)

ARGUMENT

1. **The Circuit Court judge did not abuse its discretion by not relying on any discrepancies in the transcript testimony against the transportation sheets, because no discrepancy existed.**

The Appellant appeals the final decision of the trial court in the denial of his motion for new trial based on after discovered evidence. In the Supreme Court case of *State v. Spann,* 334 S.C. 618, 513 S.E.2d 98 (1999) the Court decided that in order to award an inmate a new trial based on after discovered evidence certain elements must be satisfied. In *Spann*, it states:

> In order to warrant the granting of a new trial on the ground of after-discovered evidence the movant must show the evidence: (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered

> before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

Id, 334 S.C. at 619, 513 S.E.2d at 99.

The Appellant argues that he is entitled to a new trial due to the fact the transportation sheets revealed a discrepancy between the testimony of the officers during his *Jackson v. Denno* hearing and what actually occurred. The trial court was correct in not granting this motion due to the fact this information could have easily been discovered prior to trial, and this information would not have changed the outcome of the trial due to the fact that no discrepancy exists.

The Appellant argues that these transportation sheets would reveal that questioning continued by the authorities after he informed them that he no longer wished to speak to them. The Appellant's position is that if these sheets were revealed to the court during his *Jackson v. Denno* hearing, the trial judge would have been inclined not to allow his statements into evidence. This would have changed the outcome of his trial.

When an inmate is attempting to get the court to re-open a case and grant a new trial based on after discovered evidence he must satisfy the above referenced elements. The first element is that the result of the trial would have been different if the evidence was found before trial. The Appellant argues that there was some discrepancy between what was testified and what occurred. He feels these transport sheets would prove this. The sheets that were provided to the court during the motion for new trial revealed that the Appellant was transported to the courthouse or the Barnwell police department on October 19, 20, and 21. These transports were already stated in Investigator Martin's testimony. And upon each period of questioning, the Appellant was read and waived his *Miranda* rights. Statements elicited during interrogation are admissible if the prosecution can establish that the suspect knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel. *State v. Kennedy,* 333 S.C. 426, 429,

510 S.E.2d 714, 715 (1998). It was clear though the testimony of Investigator Martin that the Appellant waived his *Miranda* rights, and the Appellant constantly initiated interrogations by contacting jail personnel to inform Investigator Martin that he wished to speak with him. The introduction of this evidence would not have changed this fact nor made his statements to the police inadmissible.

This evidence also could have been discovered prior to trial. During the motion for new trial the Appellant hired investigator John Thomas Burgess. Investigator Burgess testified that he obtained these records the same day they were requested. (R. p. 36 lines 20-25) The Appellant knew he spoke to law enforcement three times while incarcerated in the county jail. He could have easily informed his counsel that he was transported to give these statements. His attorneys could have then easily obtained these sheets as Mr. Burgess did fourteen years later. These sheets are not material to the issue, and are also cumulative and impeaching. This material does not reveal any wrongdoing that occurred due to the fact Investigator Martin testified about the interrogations that these sheets reflect. These sheets just reveal what was already testified to during pre-trial. This information did not raise to the level to allow for a new trial. The decision of the trial court was correct and should be upheld.

2. **The circuit court did not abuse its discretion because the transportation sheets did not reveal the Appellant was asked questions after he expressed he did not wish to talk.**

The Appellant argues that he was continued to be questioned after he expressed to the authorities he no longer wished to talk. He did express to Investigator Pruitt that he did not wish to answer any further questions. Due to this expression the trial court granted the Appellant's motion to exclude any statement given to Investigator Pruitt. After this decision, however, the Appellant made it clear he wanted to meet law enforcement in order to talk with them.

During trial the Solicitor argued that the wishes of the Appellant not to answer questions were "scrupulously honored," as required in the United States Supreme Court case of *Michigan v. Mosley.* In *Mosley,* the Court determined:

> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means...to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored..." **The critical safeguard identified in the passage at issue is a person's "right to cut off questioning."** Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on **whether his "right to cut off questioning" was "scrupulously honored."**

Michigan v. Mosley, 423 U.S. 96, 102-104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)(emphasis in original).

In interpreting *Mosley* Courts have set forth five factors to determine if the questioning was "scrupulously honored:"

> (1)Whether the suspect was given *Miranda* warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of *Miranda* warnings before the second interrogation; and, (5) whether the second interrogation was restricted to a crime that had not been subject of the earlier interrogation.

Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

In viewing the facts relayed to the court during the *Jackson v. Denno* hearing, it was correctly determined by the trial court that the Appellant wishing not to be questioned was "scrupulously

honored," so the continuation of questioning by Investigator Martin upon request by the Appellant was lawful.

The Appellant was read his *Miranda* rights prior to each interrogation. The Court did not allow any statements made by the Appellant to Investigator Pruitt due to the fact he did request not to answer any further questions. It was testified that there was a passage of ninety minutes between the questioning of Investigator Pruitt and Investigator Martin, which was a sufficient passage of time to resume questioning.[2] Investigator Martin testified that he provided a fresh reminder of his *Miranda* warnings before each interrogation and provided him a written warning that he signed. The courts have held that the second interrogation can be related to the same crime. A second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview. *Jackson v. Wyrick,* 730 F.3d 1177, 1180 (8th Cir. 1984), *cert. denied* 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984). As long as new *Miranda* warnings are given, and initial requests to remain silent are scrupulously honored, statements from subsequent interrogations on the same subject are admissible. *United States v. Finch,* 557 F.2d 1234 (8th Cir. 1977), *cert. denied* 434 U.S. 927, 98 S.Ct. 409, 54 L.Ed.2d 285 (1977)

3. **The Court did not abuse discretion because it did not allow a new trial due to the Appellant stating he was intoxicated at the time the crime occurred.**

The Appellant argues that the trial court abused discretion due to the fact it did not consider him for a new trial even though while he gave his statement, he was supposedly under the influence of drugs. During the motion for new trial the Appellant made some accusations as to his state of intoxication during questioning, and promises made to him regarding protection for him and his

[2] *Mills v. Commonwealth,* 996 S.W.2d 473 (Ky. 1999), *cert denied,* 528 U.S. 1164, 120 S.Ct. 1182, 145 L.Ed.2d 1088 (No *Miranda* violation where defendant spoke with second officer, after invoking right to remain silent with first officer, though encounter with second officer came only about 20 minutes after invocation of right and involved same crime.)

family. The court determined that the Appellant's claims were not credible. (R. p. 258, 262) The trial court has the authority to determine if a witness is credible. *State v. Johnson,* 413 S.C. 458, 776 S.E.2d 367, 372 (2015).

The Appellant failed to present any evidence revealing that he was intoxicated to the point of permanent insanity, which is the only way voluntary intoxication can be used as a defense. Voluntary intoxication, where it has not produced permanent insanity, is never an excuse or a defense to a crime, regardless of whether the intent involved be general or specific. *State v. Vaughn,* 268 S.C. 119, 125, 232 S.E.2d 328, 330 (1977). The trial court had only to believe either the Appellant or Investigator Martin. The trial court deemed Investigator Martin more credible when he testified. That would be the most logical conclusion due to the fact the Appellant was questioned four times over a period of four days. There would not be a possibility that he could remain under the influence for this time period without having access to drugs. During that period he was an inmate within the county jail. There was no evidence presented that any one provided the Appellant drugs during this period of incarceration. Since the Appellant has provided no evidence of his intoxication for the entire period of questioning, the court was correct in not awarding the Appellant a new trial. It is a decision that should be upheld by this court. Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *State v. Banda,* 371 S.C. 245, 639 S.E.2d 36, 39 (2006). Appellate court is bound by the trial courts factual findings unless clearly erroneous. *State v. Preslar,* 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005).

4. **The Court did not abuse discretion because the solicitor did not have the Appellant's juvenile mental health records, so there exist no violation of Rule 5.**

The Appellant argues that the court abused discretion due to the fact the state failed to produce his advice of rights form waving *Miranda*. The advice of rights form was identified by Investigator Martin. (R. p. 168 lines 2-3) There was no doubt that the Appellant waived his rights to an attorney each time he was interviewed by law enforcement.

The Appellant also argues that the Solicitor did not provide his juvenile medical records in discovery. Those records was not in the possession of the solicitor. In order for the solicitor to obtain those records they would either need a court order or consent from the Appellant himself. There has been no evidence presented in the record that the solicitor had ever requested an order from the court or consent from the Appellant to obtain those records. The solicitor is not obligated to present any material in discovery that they do not have in their possession. Pursuant to rule 5:

> Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which **are within the possession, custody or control of the prosecution**, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at trial, or were obtained from or belong to the defendant.
>
> Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which **are within the possession, custody or control of the prosecution**, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the possession, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at trial.

Rule 5(C)(D) SCRCrimP (emphasis added)

The Appellant never presented any evidence that his juvenile medical records were ever in the possession of the solicitor. Any medical records would be evidence that would be used in mitigation, the solicitor would have no reason to have this information in their possession. It would be more likely in the possession of the Appellant's counsel. Since no proof had been presented that the solicitor had any of this information in their possession, there exists no a violation of rule 5.

This argument also does not fall under the parameter of after discovered evidence. Any juvenile medical record was available prior to trial and there is no evidence that if these records were presented, the outcome would have been different. This court should not consider this argument viable due to the fact it does not pertain to what was presented to the trial court regarding what the Appellant was seeking, a new trial based on after discovered evidence.

5. **The lower court did not abuse discretion by not ruling to amend the Appellant's sentence. The Appellant was eighteen when he committed the crime so he was given a lawful sentence of life without parole.**

The Appellant argues that the trial court abused its discretion when they did not consider his motion to amend his sentence. The authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion. *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

The Appellant argues that the trial court sentencing him to life without the possibility of parole should be considered an abuse of discretion. The Appellant argues that this is a disproportionate punishment because scientific research shows that his class of individuals share the identical mitigating characteristics as juvenile offenders.

In *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) the United States Supreme Court decided that sentencing a juvenile to a mandatory sentence of life without the possibility of

parole violates the Eighth Amendment of the United States Constitution. In the case of *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014) the South Carolina Supreme Court took the identical measures as in *Miller* and applied it to South Carolina juvenile defendants. Since the Appellant was the age of eighteen when he committed this offense, he was considered an adult; therefore, neither of these decisions apply.

In *Miller,* the United States Supreme Court decided that the eighth amendment forbids a sentencing scheme that mandates life imprisonment *without* the possibility of parole for juvenile offenders. In *Aiken v. Byers,* the South Carolina Supreme Court made the identical determination and applied it to South Carolina juveniles serving sentences of life without the possibility of parole. Since the Appellant was the age of eighteen at the time he committed the offense, he was not considered a juvenile. The trial court did the correct thing by not considering any resentencing.

In their plain language both the *Miller* and *Aiken* decisions only apply to cases where an inmate as a juvenile received a life sentence *without* the possibility of parole. This does not currently apply to the Appellant. But only to individuals who were under the age of eighteen when they committed the crime. In *Aiken v. Byers* the Supreme Court determined:

> In South Carolina pursuant to Section 63-19-20 of the South Carolina Code, a juvenile is a person less than seventeen years of age. However, *Miller* extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen.

Byers, 410 S.C. at 536, 765 S.E.2d at 573 fn. 1

The Appellant was over the age of eighteen at the time he committed this offense. Therefore, he cannot be considered a juvenile. Since the offense of murder carries a thirty year to life sentence.[3]

[3] A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. S.C. Code Ann. §16-3-20 (2010)

The Appellant was given a lawful sentence and it was up to the sentencing judge to change this sentence. Since the trial court decided not to address this issue, the sentence will stay.

CONCLUSION

The trial court made the proper decisions regarding this matter the Respondent respectfully request this court to affirm the decision of the trial court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General

J. STROM THURMOND
Solicitor Second Judicial Circuit
P.O. Drawer 3368
Aiken, South Carolina 29802
(803) 642-1557

BY: *s/ Tommy Evans, Jr.*
Tommy Evans, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

December 22, 2020

RECEIVED
Dec 22 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
The Honorable Perry M. Buckner, III, Circuit Court Judge
Appellate Case No. 2019-001842

THE STATE,.....RESPONDENT

v.

ALFRED T. WALKER #307914,.....APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 22nd day of December, 2020.

s/Tommy Evans, Jr.
Tommy Evans, Jr.
Assistant Attorney General

ATTORNEY FOR RESPONDENT